113 No. ( )

Supreme Court, U.S.
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In The OFFICE OF THE CLERK

# Supreme Court of the United States

RICHARD AND SHARON THEUSCH,

*Pro-Se Petitioner,*

v.

TAD BERG, et al.,

*Respondents,*

**On Petition For Writ Of Certiorari To The State Of Minnesota In The Court Of Appeals**

## PETIION FOR WRIT OF CERTIORARI

Richard and Sharon Theusch
22308 Gateway Drive
Osakis, Minnesota 56360
320-732-3094

## QUESTIONS PRESENTED

**1)** Whether Appellant and/or District Courts may utilize a prescriptive road statute, in the event of an inaccurately, and unlawfully recorded road, thus disregarding applicable law on the books threatens to overturn the Fifth Amendment "due process" and "just compensation" claus, encourages deprivation of rights forbidden under the Fourteenth Amendment; and "violates" the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970; which in turn, guarantees the "fair and equitable treatment of citizens whose property is taken for public use"?

**2)** Whether condoning extraordinary irregularities in a District Court, encourages deprivation of civil rights, threatens the integrity of the United States judicial system, undermines the basic right of every citizen to "equal justice under law" and "equal protection under law", and warrants an immediate appellant discretionary review?

## PARTIES

Petitioners are Richard and Sharon Theusch. Respondents are Tad Berg and Everett Berg Individually and as Employees of or Subcontractors of Leslie Township and Leslie Township.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS AND ORDERS BELOW

The opinion of the highest state court to review the merits appears at Appendix **A** to the petition and is unpublished.

## JURISDICTION

The date on which the highest state court decided our case was **July 15, 2008.** A copy of that decision appears at Appendix **A.** The jurisdiction of this Court evoked under 28 U.S.C. 1257 (a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person shall....be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".

The Fourteenth Amendment to the U.S. Constitution provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

The Petitioners' case arose on November 14, 2003 when the Respondents in the employment of Leslie Township in Todd County, Minnesota, entered the

Petitioners' property with heavy machinery and chain sawed one hundred and thirty five trees without giving Petitioners statutory notice and denying the Petitioners their constitutional rights to "due process of law." Respondents do not deny failure to give notice. Respondents do not deny the chain sawing of one hundred and thirty five trees.

Since the onset of Petitioners' case there has been a deprivation of Petitioners' rights, as well as a history of intimidation and oppression. On the same day the trees were chain sawed, another township official came on the Petitioners' property and threatened to take out their fence if Petitioners objected. (App. G, 51) (lines 20-25.) There have been continuous problems regarding evidence in this case. The Respondents noted in the Trial Memoranda, that the county ordered the chain sawing of the trees. The Petitioners immediately contacted the County. The county engineer left a message on the Petitioners' answering machine, saying: "anything the Township did they did on their own." The Petitioners delivered the tape to their attorney, Mrs. Clark, to be used as evidence at trial. The tape

remained on the desk in front of Petitioners' attorney at trial. The Petitioners' request that it be delivered into evidence was ignored. The Respondents stated that Todd County had a problem with the trees; however, this statement was not supported by any direct testimony in the transcript. The Petitioners contacted the Long Prairie sheriff and reported the damage to their property, after talking to the county engineer. (App. G, 52.)

During the course of the case, the Petitioners located an instrument recorded against their property and recorded against their Legal Abstract. The Petitioners' Legal Abstract dates back to the 1800's. The Township recorded and certified, an "invalid" instrument containing false information at the Todd County Recorder's Office. The recorded instrument placed a sixty-six foot (four rod) road through the Petitioners' property. (App. G, 56.) Again, the township did not provide the Petitioners statutory notice and denied Petitioner(s) their U.S. and Minnesota Constitutional rights to "due process of law"; and denied Petitioner(s) their Constitutional right to not have "private property taken for public

use without just compensation." The recorded instrument stated "platted 1984" and attested to a "duly" (legally or properly), "established centerline for a sixty-six foot wide road through the Petitioners' property. (Court Exhibit #17.) Petitioners' property was never platted. The Petitioners were never notified of a legal "centerline" survey being performed on their property. The description of the recorded road on the Petitioners' property is on page 15 of the recorded and certified Instrument #340895 which is Court Exhibit #16 &17, also App. G, 55.) The road on Petitioners' property is described in Court Exhibit #16 &17 under: "Township Road T597 (aka. Bambi Trail) (App. G, 55.)

The Petitioner purchased five acres in 1979 on a Contract for Deed. ( Exhibit A of Court Filed Summons and Complaint.) In the 1970's Leslie Township constructed a primitive road without establishing it as a town road or cart way. No evidence was introduced at trial supporting the road being built with plans or specifications, nor was any evidence introduced of a properly filed road order with the county auditor, or even evidence that the

construction was opened for bids. Petitioner testified during the trial that there were no culverts or ditches built along Petitioners' property. (TT pg 27 lines 2-3.) The township 911 address signs are also along the 1960 platted road and not along the township's claimed easement on Petitioners' property. (TT pg. 131, lines 5-10.)

The original road "Bambi Trail" ( Gateway Drive) was platted in 1960 at fifty feet wide along Little Osakis Lake, and the fifty foot wide road became a twenty-six foot wide road continuing along the section line on this plat and was "dedicated to the public forever." (App. G, 59.) This original Bambi Trail did not go through the Petitioners' property whatsoever. The Petitioners' property was never dedicated, gifted, or platted, nor was there an eminent domain procedure initiated against it by Leslie Township. In 1981, Little Osakis Acres Plat was established. Bambi Trail remained unchanged and remained platted along the section line and not through the Petitioners' property on this recorded plat. (App. G, 63.) The Petitioner was not given notice of the platting of Little Osakis Acres even

though the west line of Petitioners' property was lot seven's boundary line of this plat. (App. G, 124.)

The Petitioner(s) was not given notice of the vacating of a portion of the original 1960 platted road. The portion of this road, which was vacated, was in 1984. (App. F, 44.)

The Petitioners' attorney failed to file the Summons and Complaint efficiently. This wasn't filed until one and half years after the trees were cut down. The Petitioners sued the Respondents for damages and trespass. The Petitioners hired NorthStar Surveying to do a personal survey of their property April 2004, and requested that NorthStar Surveying point out the private easement for "ingress and egress" which is described in the legal description of Petitioners' deed to their property. Northstar Surveying provided a certificate of survey illustrating the correct placement of the easement on the Petitioners' west line. (App. G, 65.) Northstar Surveying also noted on this survey that "the centerline of the town road was not determined, and the survey did not determine what the Petitioners owned." Petitioners hired Engelmeyer Surveying for

another opinion. This survey is different than NorthStar's and fails to illustrate the easement on Petitioners' west line. (App. G, 68.) The employee of Engelmeyer Surveying, while in the Petitioners' employment, told the Petitioner their easement was on their Northeast Line and that he would "testify to that in court and you would not win". (TT Pg 41, lines 1-5.) Petitioners wrote Mr. Engelmeyer regarding the incident. (App. G, 71.) Later the Petitioners learned that Mr. Engelmeyer was the previous Todd County Surveyor. His name also appears on the half section map, which contains Petitioners' property. This map was developed in 1983 and revised in 1990 and 1993; however, the mistake of a sixty-six foot road on and through the petitioners' property was never corrected. (App. G, 73 and Court Exhibit #2.)

The township sent three more people to the Petitioners' property without Petitioners' consent. Representatives sent by the township provided testimony of their opinions of the damage, the value of the Petitioners' property, and where a road easement should be placed. The Petitioners were

disturbed over what they perceived as further intimidation and oppression by the township. The Petitioners hired their own experts (foresters, appraiser, and surveyor). These experts also testified at trial. The Petitioners were forced to mediate with the defendants who cut down their trees, even though the defendants had executed an unlawful act.

The case was set for a jury trial. Before the trial began on August 4th, 2006, the Petitioners discovered that the recorded and certified Leslie Township Resolution to Record Town Roads #340895 did not meet additional statutory requirements and was recorded well after the time frame allowed by law. (MS 164.35, Subd 4.) Petitioners' attorney wrote a letter to the Court at the request of the Petitioners on August 6, 2006 regarding addressing these deficiencies. (App. G, 74.)

The Petitioners' attorney told them that they "were opening a can of worms." There were numerous irregularities, which contribute to the unjust actions:

- The jury was dismissed the morning of the trial. The Petitioners were not given an explanation, even though there were many facts yet to be determined. Petitioners were not afforded an opportunity to have the facts determined by the jury.
- A motion for Summary Judgment was not requested by either party.
- Before the second day of the trial began the Petitioners' attorney stated: "I know your honor, you told us to make it quick."
- After three years of Petitioners providing every possible piece of evidence, the Petitioners' attorney stated the morning of the trial, "**I do not have all my exhibits with me at this time, I left them at the office.**" (TT Pg 20 lines 3-4.) However, the Petitioner and their attorney's husband carried in boxes of evidence, placing them under the desk at trial. When Petitioners asked their attorney, Mrs. Clark, if the judge "would get to see any of it", the Petitioners were told "don't worry he will see them."

- One piece of evidence was taken home by a witness for the Respondents and was mailed back to the Judge. (App. G, 78. )
- During the trial Respondents presented photo evidence, which was not provided to the Petitioners in discovery. In fact, the Respondents refused to answer a single Interrogatory or produce a single document stating, "they were untimely." (App. G, 80. )
- The important Northstar Surveying Certificate (Exhibit 1 of the Court Exhibits), failed to be mentioned on the Petitioner's filed List of Court Exhibits with the court, even though this exhibit was provided to the Petitioners' attorney months prior. The Petitioners had to search for this survey in the boxes under the desk at trial, eventually pushing it in front of their attorney, Mrs. Clark, during the trial. This certificate, which illustrated the exact placement of the west easement on the Petitioners' property as it was described on their deed's legal description, was marked as evidence during the trial and received by the Court. (Exhibit A of Court filed Summons and Complaint.)

- A clean copy provided by the Respondents apparently did not make it in the court file. (TT pg 20 lines 6 thru 18) also (Court Exhibit 1.)
- The evidence of the large septic mound and Planning and Zoning notes regarding the township's permission to put septic pipes under the old un-vacated portion of the platted road installed in 2005 (although also provided to counsel), did not make it into evidence. (App. G, 91.) The photos depict the septic mound which is almost seven feet high and seventy feet long and is a direct contradiction to the township's need to widen the alleged road through Petitioners' property. This was listed on the List of Exhibits for Trial filed with the Court. (App. G, 94.)
- The District Court Judge allowed the Respondents' counsel to take back exhibits of tree stump evidence at the end of the trial. (TT pg 166, lines 1 thru 8.)
- The District Court Judge arrived on the Petitioners' property after the trial and spoke with the Respondent, T. Berg, without Respondent being

under oath, and without objection from Petitioners' counsel. (TT pg. 165 lines 12 thru 19.)

- Petitioners supplied a plethora of documents to their counsel. Many of these were marked by the Respondents' counsel and used to question the Petitioner for over two hours in the deposition. (Theusch Deposition filed with Court.) The Respondents' counsel intimidated the Petitioner during the deposition. (TT pg 26 lines, 10 thru 16.)
- Although there was no jury present, there were many sustained objections in favor of the Respondents.
- The Petitioners' attorney did not challenge testimony.
- The Petitioners were told their important witnesses "did not want to testify," these included the Township Clerk, the current Todd County Surveyor, Northstar Surveyor, and the Sheriff' Deputy.
- A pretrial order denying the Respondents' Motion in Limine regarding suppressing "notice" was not presented for signing until four months **after** the trial.. (App. E, 42.)

- The video trial deposition of R. Engelmeyer, the previous Todd County Surveyor, taken on August 4, 2006 (App. G, 96 ), was delivered into evidence to the Court on August 9, 2006. (TT pg 92, lines 16 thru 25.) However, the trial deposition was not played, read, nor referenced during the trial. This testimony contained important information regarding Petitioners' property and the unlawful road on it, as well as questioning how a "50 foot road became a 66 foot road as it entered onto the Petitioners' property." (Engelmeyer Trial Deposition, pg 22, lines 2 thru 7) and (TT pg 25. lines 16 thru 20.)
- Respondents' second Motion in Limine addressed a request from Petitioners for emotional damages. Petitioners never requested emotional damages.
- The Petitioners' twenty-six page trial memoranda, which their counsel prepared for the District Court in making its decision has written on its face, "Void W W". (App. G, 99.) Petitioners were not aware if there was an error in format, or whether the document explaining their case was voided.

- There were additional problems with evidence during the trial. Evidence was not marked ahead of time, and in addition, some were retracted. (TT pg 129, lines ll-21), (TT pg 92, lines 8-17), (TT pg 96, lines5-8.)
- Although the Court stated at the end of the second day of the trial, "We have a situation here where there has not been notice to the plaintiffs, and I want to know your interpretation of what the consequences of that ought to be?" (TT pg 164, lines 1 thru 10); the October 4th, 2006 Order for Judgment ordered the Petitioners to pay $8,476.56 to the Respondents for Respondents costs and disbursements, while the Petitioners' claims were dismissed with prejudice. (App. G, 100.)
- Counsel failed to inform Petitioners she was running for Todd County Attorney, thus creating a possible conflict of interest. Petitioners discovered this shortly before the District Court Trial.
- Respondents' counsel objected to testimony of the Petitioners' expert witness (U of M Instructor/Forester) even before their expert witness had an opportunity to speak. (TT pg 96,

lines 9 thru 19.) It is not clear to the Petitioners if the expert testimony and resume were considered. (App. G, 104.)

The Petitioners brought forth a Motion for Amended Findings. The February 15, 2007 District Court Order awarded the Petitioners fifty six hundred dollars and their other claims were dismissed with prejudice.

Petitioners appealed damages and road issues to the Minnesota State Appeals Court. The pre-paid attorney refused to do the oral argument and withdrew. (App. G, 109.) No explanation was given to the Petitioners. The tree issue was remanded back to District Court and the Petitioners were denied damages for their property being unlawfully taken for a recorded road and were barred under statute of limitations in MS 160.05.

Petitioners pre-paid yet another attorney to do a Petition for Review to the Minnesota Supreme Court. Petitioners pleaded with the new attorney to write in the petition that there was a violation of Petitioners' Constitutional Rights and violation of the Federal Uniform Act, specifically. Petitioners request for

review was denied. Counsel, Mr. Mack, told the Petitioners he would take the case to the U.S. Supreme Court for free; however, counsel also told the Petitioners they "must go to District Court first. The Petitioners discovered, early in October, that the Writ of Certiorari had to be submitted by mid October. Once again, Petitioners were deprived of their rights. Utilizing the Statute of Limitations in MS 160.05 and barring rights to damages for the unlawful taking of Petitioners' property on the invalid recorded instrument is not consistent with the "due process" and "just compensation" clauses of the 5th and 14th Amendments to the U.S. Constitution, and is not consistent with the Federal Uniform and Relocation Assistance Policies Act of 1970. Local laws that run contrary to the U.S. Constitution should be null and void.

## REASONS FOR GRANTING THE PETITION

"When any court violates the clean and unambiguous language of the Constitution, a fraud is

perpetrated and no one is bound to obey it "*State v. Sutton,* 63 Minn. 147 65 NW 262 30 ALR 660, also , *Watson v. Memphis,* 375 U.S. 526; 10 L Ed 529; 83 S. Ct. 1414. The experience of the past five years litigating in the U.S. Judicial system has been beyond unfair; it has been a mockery of "equal justice under law." Irregularities and reasons for an appellant discretionary review are referenced throughout the Statement of the Case. When a government entity records a false instrument against real private property in a public office without notice to the rightful land owners, and then enters the same private property without notice and destroys property that does not belong to them by chain sawing trees, and thereby further intimidating and oppressing the victims by sending people to their property to belittle the damage and belittle the very home they live in, threaten them, and instead of receiving justice in the judicial system the Petitioners were ordered to pay the Respondents costs and disbursements; without regard to the Petitioners' civil and constitutional rights, making it necessary for them to further litigate; such

occurrences are beyond unfair, they are a serious deprivation of basic constitutional and civil rights.

The Minnesota Appellant Court ruled that the Petitioners are barred from receiving damages for their property that was taken for public use. It was ruled that the statute of limitations of MS 160.05 barred Petitioners from seeking damages for the government taking. Petitioners respectfully disagree. Laws are on the books to properly and lawfully establish and record town roads.

In 1973 Minnesota town roads were required by law to be "lawfully" recorded.

> (a) The order establishing, altering, or vacating any road **shall be recorded** by the town clerk, and a copy thereof certified as true and correct by the town clerk shall be forthwith recorded with the county recorder or registrar of titles of the county within which the land and premises are located. The certified copy of the order shall be first presented to the county auditor who shall enter the same in the transfer records and note upon the certified copy over the auditor's

official signature, the words "entered in the transfer record."

(b) The order or a certified copy shall be received in all courts as competent evidence of the facts therein...."(MS 164.07, Subd. 11.)

MS 164.07 requires town roads be lawfully recorded. (Laws of Minnesota 1973 Chapter 24-S.F. No 62.)

Prescriptive easements were abolished when it became law for townships to lawfully record their town road easements (MS 164.07, Subd. 11), because more accurate road inventories were needed by the County Auditor to be used in preparation for the annual financial report. Resolutions were required, to be adopted by law and required the date and circumstance of each acquisition. Leslie Township chose to record each acquisition according to the formal Alternate Recording Method for town roads as outlined in MS 164.35 using the Map Procedure. However, Leslie Township failed to conform to the requirements in MS 164.35 in recording its alleged Township roads. (Letter to the District Court Judge

dated August 6, 2006 (App. G, 74), and (Court Trial Exhibit #17.)

Respondents do not dispute Leslie Township failed to comply with Minnesota Statutes 164.35. (App. A, 19 (footnotes.) Minnesota Statutes also require boundaries to be marked regarding establishing the width of the acquisition. (MS 160.14.) No boundaries were lawfully marked on Petitioners' property or the adjoining property for the alleged sixty- six foot recorded town road.

A report prepared for the Minnesota Department of Transportation entitled "Proposal for Alternate Method to Record Town Roads/Town Road Study," dated June 27, 1986 states: "According to current law, township road orders relating to establishment, vacation and alteration of a road "must" be filed with the County Recorder." (App. G, 111 .)

The Town Road Account created in the County State Aid to Highway Fund is also significant, because the township receives funding for construction, reconstruction and maintenance for its town roads.

Since, "the town road account is created in the County State Aid to Highway Fund," (MS 162.081, Sub. l); money distributed to a town under this subdivision may be expended by the town only for construction, reconstruction and gravel "maintenance" of town roads within the town. (MS 162.081, Sub. 4.) "Funds in the Town Road Account must be apportioned to each county so that each county receives the percentage that the total miles of town roads in the county bears to the total miles of town roads in the state". (MS 162.081,Subd. 2.) MS 162.081 allows for funding for road maintenance. The Township receives funding (gas tax) based on "maintenance miles" turned into the county engineer annually. Leslie Township has been certifying its maintenance miles for funding from the Town Road Account years prior to recording its town roads and years before the road on Petitioners' property was recorded. (App. G, 114.) "The town board has authority within the sixty-six foot right of way to 1) maintain or reconstruct a "recorded" road used for vehicular travel." (MS 164.36.)

This statute does not address giving the township a legal right to maintain a "prescriptive easement." The road on Petitioners' property was recorded at 66 feet wide: "To the extent this section requires recording or dedicating a town road to a width greater than that of it previous, actual public use, Section 164.07 governs any award or procedures relating to damages sustained, if any, by the property owner." (MS 164.35, Subd. 4g.) Town roads are required by law to be lawfully recorded (MS 164.07, Sub. 11) and roads are required to be four rods (sixty-six) feet wide. (MS 160.04.) Therefore, utilizing a prescriptive easement for a town road which has been receiving funding from the Town Road Account, and which was required by law to be, lawfully recorded is not valid.

> Except as otherwise provided, all roads here after established, except cart ways shall be at "least" four rods wide. Additional right-of-way and easements, including easements needed for drainage, may be acquired by purchase, gift, or eminent domain proceedings when necessary for construction, "maintenance",

safety, or convenient public travel." (1959) (MS 160.04.)

Since, it is required by law for town roads to be lawfully recorded at four rods wide and since towns have "authority over a "recorded road," and the town board has authority within the sixty-six foot right-of-way to: "maintain or reconstruct a **recorded** road used for vehicular travel" (MS 164.36 (1), township roads must be recorded properly at sixty-six feet wide. (MS 160.04.) Additional necessary right of ways may be acquired by eminent domain proceedings: "If, after a town establishes a road under the provisions of MS 164.06 and MS 164.07, the board has the authority to acquire the necessary right of way thereof by purchase, gift or eminent domain proceedings." *Op. Atty. Gen.* 377-B-10-K, Dec. 9, 1960.

Neither the Petitioners, nor the owners of the adjoining one-third acre property whose boundary line is Petitioners' Northeast property line, gave a right of way to the township. The township did not purchase the Petitioners' property, or the adjoining neighbors' property. The township has never

initiated a formal eminent domain procedure. A Township road was simply never established legally on Petitioners' property. Because Leslie Township chose to record its roads formally by "Resolution," the township cannot fall back on the claim that they have maintained the road thereby creating a township road. Further more, the adjoining one-third acre is private property, and there is not an easement on this property's legal description dedicating a right of way to the Respondents. (Exhibits B of Court filed Summons and Complaint.)

"Where no petition for establishment of a township road was {made} and no township records show the legal establishment of the road, the presumption is that the premises were never designated as a township road." *Op Atty. Gen.* 1922. No. 399. P. 297

Because a sixty-six foot "township road" through the Petitioners' property was established in the Township Resolution of Road Easements – Instrument #340895, (Court Exhibit 17), by the Township officers on July 31, 1990 and recorded in the Todd County Recorder Office February 12, 1991;

and the township did not follow the proper statutory procedures to establish that resolution (MS 164.35), the portion of the road on Petitioners' property is not a town road and the township does not have a legal right of way. "A road cannot be established or vacated without an order signed by the board. Such order must be complete and sufficient on its face and its defects cannot be supplied by parole evidence" *Keys v. Minneapolis and St. Louis Railway* 36 Minn. 290, 30 N.W. 888 (1886); See *Banse v. Town of Clark* 69 Minn. 53, 71, N.W. 819 (1897.)

The Petitioners' Abstract for Deed (legal title) includes farmland up to the section line. (App. G, 116.) There is no documentation in the Petitioners' Legal Abstract regarding any sale of the "cut off" of one third acre from the NW corner of the original five acre lot, nor is there documentation of a road ever being built on the Petitioners' property. The Petitioners' Legal Abstract goes back to the 1800's. The Petitioners were the "bonafide" owners of the original "five acre" lot which is located in Section 25 (App. G, 73), and they paid taxes on the full five acres. (App. G, 118.) The testimony of the Petitioner

regarding the road "forking", explains the placement of the original 1960 platted road. (TT pg 21 lines 1 thru 14.) Photos given to the Petitioners' attorneys to be used as evidence of the road forking through Petitioners' private property were listed in the filed list of Court Exhibits (# 24), but the attorney failed to deliver to the court this significant evidence, as well. (App. G, 119.) Culverts were not installed on Petitioners' property. Ditches were never constructed on Petitioners' property. Culverts were installed under the 1960 platted road, not the gravel on Petitioners' property. (App. G, 120.)

A survey certificate prepared by the Respondents' surveyor (K Deleo) which was included in the Petitioners" Appellant Brief index under App. #AA22, (Court Exhibit 27 also (App. G, 121), illustrates that the corner of the Northeast Line of Petitioners' property should be "25.97 feet" further west. This measurement, along with the testimony regarding the "87.51 foot" marker (near mail box) (TT pg 22, lines 2 thru 17), and the fact that the west line measures approximately seventy more feet which said measurement continues across the gravel,

places the accurate NE boundary line at the foot of the septic on the adjoining one-third acre and establishes the Petitioners' property extends past the existing gravel. (Engelmeyer's deposition testimony pg 18, lines 2 thru 25.)

The survey introduced at trial by the Respondents' witness (surveyor) fails to illustrate the boundary line of the adjoining one-third acre and does not illustrate the westerly easement along the Petitioners' west property line which is clearly depicted on Petitioners' personal survey certificate prepared by Northstar Surveying. The Respondents' survey appears to be a survey placing Petitioners' trees in a possible 50 or 66 foot right of way. (App . G, 122.) K. Deleo's survey was used in the Court to depict a "road" on the Petitioners' property; however, it lacks elements of a "legal" road survey. (Ex. of a portion of a legal road survey Exhibit 26 of Theusch Deposition.) The Respondents' surveyor admits he did not know the width of the road on Petitioners' property. (TT pg 142, lines 15 thru 25.)

The Respondents' surveyor entered the Petitioners' property unannounced, as indicated in

the transcript: "We did not call". (TT 144, lines 4 thru 8.)

"No surveyor may enter upon any land unless first notifying the owner". (MS 505.31.)

When the Petitioners hired their own surveyor, Northstar Surveying, illustrated the correct easement on the Petitioners' property which is along their 156 foot west line. (App. G, 66) and (Court Exhibit 1.)

Since funding from the Town Road Account is based on "maintenance" miles, and since town roads are created in the County State Aid to Highway Fund (MS 162.081) and receive funds for maintenance; and since the law requires town roads be lawfully recorded (MS 164.07, Subd. 11), at 66 feet (four rods) wide (MS 160.04), and since towns have authority to maintain **recorded** roads (MS 164.36), and since the township turns in its maintenance miles annually for its allotment from the Town Road Account (App. G, 114), claiming a prescriptive easement after the fact is illogical. Leslie Township was required to conform to the Alternate Road Recording procedure outlined in MS 164.35, which

requires "notice" when the town roads were recorded. (MS 164.35 Sub. 4c.)

If a legal and proper centerline had been established for the recorded road as was claimed in the certified instrument #340895, boundary lines may have been precisely marked according to law. (MS 160.14.) However, they were not. A licensed surveyor in the "employ of the County" would have "certified" the accuracy of the recorded map. (MS 160.085 Sub 1c.)

Petitioners must receive notice of the road being recorded on their property:

"Personal service of the notice of hearing on a petition to establish a town road "must" be made on each occupant of the land which the proposed road will pass; i.e. upon the person having the actual possession and control of the land." *Thompson v Town of Berlin,* 87 Minn. 7, 91 N.W. 25 (1902)

Petitioners are entitled to damages for the taking of their property for a road:

"Towns are liable for damages assessed to owners whose lands are taken for town roads." *Woodruff v. Town of Glendale,* 26 Minn. 78, 1 N.W. 581 (1879.)

Respondents chose MS 164.35, "Alternate Road Recording", to formally record their alleged town roads; however, they did not conform to the statutes. Petitioners' property was taken unlawfully without just compensation.

"These provisions have been interpreted to mean that property owners must receive the full diminution in the market value of their property occasioned by a taking." *Victor Co. v. State*, 186 N.W. 2d 168 (Minn. 1971.)

By law, the portion of the road, which travels through the Petitioners' property, is not a town road: "Town roads shall be established, located, relocated, constructed, reconstructed, improved and maintained, or vacated by the several towns. (MS 164.02 Sub. 1.) "Acquisition: "They may acquire by purchase, gift, or eminent domain proceedings as provided by law all necessary right of way for such roads...." (MS 164.02 Sub. 2.)

Laws, which are clearly established laws, must be enforced. Denial of fundamental rights to substantive, as well, as procedural due process, and denial of equal protection under the laws, runs

contrary to "due process of law" clauses as indicated in the U.S. Constitutional Amendments.

"It is the duty of the courts to be watchful for Constitutional right violations of the citizens, against any stealthy encroachments thereby." *Boyd v. U.S.*, 116, U.S. 616, 635, (1885.)

In Respondents' second pretrial Motion in Limine dated July 24, 2006, the Respondents' attorney stated:

"Since there is no civil penalty for failing to give notice, the fact Leslie Township failed to provide notice is irrelevant and any evidence pertaining to its failure to give notice should be suppressed" (Court Filed Respondents' Motion in Limine.)

Evidence has been suppressed throughout Petitioners' case. Failure to give proper notice denied Petitioners of their Constitutional Rights to "due process of law."

Even by "definition" Petitioners' property is not a town road:

> "Town roads" includes those roads which have heretofore been or which here to after may be established, constructed, or improved under

> the authority of the several town boards, roads established, constructed, or improved by counties that have been maintained by the towns for a period of a least one year prior to July l, 1957". (MS 160.02, Sub. 28.)

The earliest date brought up in the trial when the town road was possibly constructed was in the 1970's. (TT p 159, line 19.)

The Petitioners are not the only people to bring forth the question of violation of their Constitutional rights. The Petitioners' attorney, Mrs. Callies, who appealed the District Court decision to the Minnesota Appeals Court pointed out the Petitioners' rights under the Minnesota Constitution Article l "Bill of Rights." The Petitioners' Appellant Brief states:

"Both the United States Constitution and the Minnesota Constitution prohibit the taking of private property without due process and without paying just compensation to the owner. U.S. Const. Amends. 5 and 14; and Minn. Const. Art. I Sec. 7 and 13." (Petitioner's Appellant's Brief pg. 15 under B.)

Violation of Petitioners' Constitutional rights was addressed in the post trial memoranda filed in District Court September 08, 2006 by Mrs. Clark, which states:

"the (plaintiffs' constitutional right to due process was violated and property taken without just compensation" (pg. 17, lines 8-10.)

"Plaintiffs' Constitutional rights were violated." ( pg 20, line 15-16) Leslie Township took the property of (plaintiff) without notice, without providing her (plaintiff) an opportunity to be heard and without just compensation."

Petitioners' "Petition for Review" to the State of Minnesota Supreme Court references the "Minnesota Constitution Article I Sec. 8 and stated:

"Every person is entitled to a certain remedy in the law for all injuries or wrongs which he may receive to his person, property, or character."

The Respondents' counsel noted there were references in the case regarding violation of constitutional rights:

"there were constant remarks and references to violations of due process and unconstitutional taking." (TT pg 9 lines 14-15)

The three Sections of the Minnesota Constitution Article I, which are referenced in the Petitioners' Appellant Brief, in relevant parts states:

- Sec. 7 "Due process...No person shall be.....deprived of life, liberty or property without due process of law"
- Sec. 8 "Redress of injuries and wrongs. Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive to his person, property or character, and to obtain justice freely and without purchase, completely without denial, promptly delay, conformable to the laws."
- Sec. 13 "Private property for public use. Private property shall not be taken, destroyed or damaged for public use without just compensation therefore, first paid and secured."

The Minnesota Constitution protected the Petitioners' due process rights to a prompt and speedy trial conformable to the laws and

compensation guaranteed for property damage for public use, yet the Petitioners were not afforded these protections as guaranteed by the Minnesota Constitution.

The U.S. Constitution also guarantees Petitioners property rights and civil rights. The U.S. Constitutional Amendment 14, in relevant part states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law nor, deny any person in its jurisdiction equal protection under the law

In order to have equal protection under the law the rule of law needs to be followed. Established laws cannot be ignored.

The U.S. Constitutional Amendment Five, in relevant part states: "nor shall any person be deprived, of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

On January 2, 1971, Public Law 91-646, the "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act), was signed into law. This law was enacted by Congress to ensure that people whose real property is acquired, or who move as a result of projects receiving Federal funding, will be treated "fairly and equitably" and will receive assistance in moving from the property they occupy. This act requires that, when property is to be acquired, each owner should be notified in such a way that an administrative record exists to attest to the delivery to the owner. There is no assurance when using public meeting that all affected owners will be present and each owner is due the courtesy of receiving a timely notice of the agency's intent. Notice should be provided as early as possible, when it is known a property interest will be acquired, and no later than when the appraisal valuation assignments are made. (Chapter 24 of the Uniform Act addresses acquiring lawful acquisitions of private property.)

In 1973 the State of Minnesota passed a compliance act relating to eminent domain; providing

for uniform relocation assistance, service, payments and benefits for displaced persons; repealing Minnesota Statutes 1971, Section 117.095.

The State of Minnesota passed eminent domain laws MS 117.50 through MS 117.56 in compliance with the "Uniform Act." Yet the Township failed to apply these statutes when acquiring the 66 foot wide town road on Petitioners' property. Minnesota Law also allows an action compelling an Acquiring Authority to initiate eminent domain proceedings, which was omitted from a current or completed eminent domain proceedings. (MS 117.045.)

Property taken for public use causes a deprivation of citizens rights who are without recourse for such actions. For this reason courts need to guard against violation of Constitutional and Civil Rights.

Although, the State of Minnesota passed a compliance act complying with the Federal Uniform Act, Petitioners were still denied protection under these laws and the fact Petitioners' private property was acquired on an invalid instrument by an "Acquiring Authority" which had the "power of eminent domain", required that established eminent

domain laws should have been followed by that acquiring Authority. No action was taken to enact the eminent domain process by the Township. Instead, Petitioners' property was taken without notice on an invalid instrument.

Petitioners, although having hired legal counsel, were not counseled regarding eminent domain, and have also been denied any protection they may have received if counsels had initiated an inverse condemnation action, an option that was also not afforded them. The Petitioners' U.S. Constitutional and Minnesota Constitutional and Civil Rights have been violated.

## CONCLUSION

"As long as a defendant who abridges a plaintiff's constitutional rights acts pursuant to a statute of local law which empowers him to commit the wrongful act, an action under the Federal Civil Rights statute is established." 42 U.S.C.A 1981 et seq. *Laverne v. Corning.* 316 F. supp. 629.

The Petitioners' property was taken from them without notice, on an invalid instrument, filed and recorded in a public office by a public official, and then damaged without notice. The Petitioners were denied "due process of law" and "denied protection under the law" resulting in a serious deprivation of their rights. An invalid statute of local law (MS 160.05) empowered the Respondents to take and damage Petitioners' property lawlessly. Because real private property was taken from the Petitioners unlawfully with no way to impede such action, the taking should not be rewarded.

"In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Butz v. Economou,* 438 U.S. 506, 98 S. Ct. 2910 (1978.)

> (Plaintiffs' Note: or "good faith") would be defeated if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the {plaintiff}, or if he took the action with the malicious intention to cause a deprivation of

constitutional rights or other injury... *Harlow v. Fitzgerald,* 102 S. Ct. 2727 at 2737, 457 U.S. 800.

A sixty-six foot road was intentionally recorded, without notice, on an invalid instrument (#340895) filed and certified in a public office by a public official against Petitioners' Legal Abstract (Court Exhibits 16 and 17, App. G, 55), falsely attesting to a "duly" established centerline for a sixty-six foot town road easement; thus disregarding applicable law for establishing and recording a legal town road. The Petitioners had no recourse to stop this unlawful taking of their private property. Petitioners received no just compensation for the taking. This unlawful taking denied plaintiffs of their Constitutional rights to "due process of law" and "just compensation" provided by the 5th and 14th Amendments and "denied them of the "fair and equitable treatment", envisioned in the Federal Uniform Relocation Assistance and Real Property Acquisition Polices Act of 1970.

Petitioners respectfully request, that the private property taken falsely and unlawfully be rescinded

back to them, however, if the court deems damages under eminent domain laws appropriate, that interest be paid to the Petitioners accruing from the date of the unlawful taking, and respectfully request Petitioners be reimbursed for attorney fees, cost and disbursements; and/or whatever the Supreme Court of the United States deems just.

Respectfully submitted,

RICHARD AND SHARON THEUSCH,
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## APPENDIX A

## STATE OF MINNESOTA
## IN COURT OF APPEALS

| | | |
|---|---|---|
| RICHARD THEUSCH, et. al., | ) | A 07-848 |
| Appellant, | ) | |
| v. | ) | **OPINION** |
| TAD BERG, et al., | ) | (Filed May 6, 2008) |
| Respondents. | ) | |

Appeal from the Todd County District Court
File No. 77-C-3-05-000492
The Honorable William Walker, Judge

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

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Richard and Sharon Theusch
(Pro Se Appellants)

Gordon H. Hansmeier, Gregory J. Haupert,
Rajkowski Hansmeier Ltd.
Attorneys for Appellee

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**WILLIS,** Judge

In this appeal from a judgment in a bench trial, appellants argue that the district court erred by concluding that certain of their claims are time-barred and that the district court's computation of damages on another claim is not supported by the evidence and is the result of error of law. By notice of review, respondents challenge the district court's award of damages. We affirm in part, reverse in part, and remand.

## FACTS

Pro se appellants Richard and Sharon Theusch own property in Todd County, Gateway

Drive,[1] a township road, forms the northwestern boundary of the Theusches' property. In 1990, respondent Leslie Township held a public hearing on a resolution to record the township's easements for "township roads and road right-of-way." The township mailed notices of the hearing to affected property owners, but the Theusches were not on the mailing list, and, thus, did not receive notice of the hearing. The resolution proposed establishing a right-of-way for Gateway Drive that extended 25 feet to either side of its centerline. The township passed the resolution in July 1990, and it was recorded with the Todd County Recorder in February 1991. In the fall of 2003, Todd County, which contracts with the

[1] At some point during the road's existence, Gateway Drive was known as Bambi Trail. Throughout the record and in the parties' briefs, the road is at times referred to as Gateway Drive and at other times Bambi Trail. For convenience, we will formally use Gateway Drive.

township for snowplowing on Gateway Drive, requested that the township clear "some of the brush and overhanging branches" along the edge of Gateway Drive because they were interfering with the county's snowplows. The township hired respondents Tad and Everett Berg to do the work that the county had requested, and on November 14, 2003, the Bergs removed approximately 135 trees from a portion of the Theusches' property that was within 25 feet of Gateway Drive's centerline. The township gave no notice to the Theusches of its plan to remove the trees.

On July 11, 2005, the Theusches filed a complaint against the respondents, asserting claims of (1) trespass to their property, (2) the unlawful removal of trees, (3) failure to give the required statutory notice of the removal of trees, and (4) compensation for a taking of their real property. Following a bench

trial, the district court dismissed all of the Theusch's claims on the ground that they are time-barred. The Theusches moved for amended findings, and the district court issued amended and restated findings of fact, conclusions of law, and order for judgment, reaffirming its ruling that the Theusches' claims of trespass and compensation for a taking of their real property are time-barred but concluding that the Theusches were entitled to $5,600 on their claim for damages resulting from the township's failure to give them notice that it was going to cut down the trees, as required by Minn. Stat. 160.22, subd. 5 (2006). This appeal follows.

DECISION

On appeal from a judgment following a bench trial, this court's scope of review is confined to determining whether the district court's findings are clearly erroneous and whether it erred in its conclusions of law. *Schweich v. Ziegler, Inc.*, 463 N.

W.2d 722, 729 (Minn. 1990); *Foster v. Bergstrom*, 515 N.W.2d 581, 585 (Minn. App. 1994). This court will affirm the district court's findings if they are "reasonably supported by the evidence as a whole, or not manifestly contrary to the weight of the evidence." *Foster*, 515 N.W.2d at 585.

**I. The district court did not err by concluding that certain of the Theusches' claims are time-barred.**

The district court determined that Gateway Drive, which includes its supporting slopes and structures, had been established as a public road through statutory dedication under Minn. Stat. 160.05, subd. 1 (2006). The Theusches argue that the district court erred in its application of the statute, claiming that (1) the district court's finding that there had been public use and maintenance of Gateway Drive for the required statutory period is

clearly erroneous and (2) the district court's determination of the width of the road exceeds the portion actually used by the public and maintained by a road authority.

Under section 160.05, subdivision 1:

> When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not.

Dedication of a public road under this statutory provision requires (1) "use by public" and (2) "maintenance by an appropriate government agency," both of which must be shown to have occurred "over a continuous period of at least six

Years." *Foster,* 515 N.W. 2d at 585-86. The proponent of statutory dedication, here respondents, bears the burden of proof. *See Ravenna Twp. V. Grunseth,* 314 N.W.2d 214, 217 (Minn. 1981). And the standard of proof is a preponderance of the evidence. *Rixmann v. city of Prior Lake,* 723 N.W.2d 493, 496 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). The question of statutory dedication is one of fact, and this court will not reverse a district court's determination unless it is clearly erroneous. *Ravenna,* 314 N.W. 2d at 217. Further, this court views the evidence in the light most favorable to the district court's findings. *Id.*

**A. The district court's findings that there has been public use and maintenance of Gateway Drive by a road authority for the required statutory period is not clearly erroneous.**

The Theusches contend first that there was no evidence from which the district court could have made its finding that there has been public use and maintenance by a road authority of Gataeway Drive for longer than the required statutory period of six continuous years. As an initial matter, we note that the Theusches conceded to the district court that there has been public use and maintenance of Gateway Drive "in excess of six consecutive years, since the early 1970's to the present time." In fact, the finding that the Theusches challenge is identical with their own proposed finding in their motion for amended findings of fact. The fact that the Theusches agreed to a finding that is identical with the district court's finding places them in a difficult position to argue that the finding is clearly erroneous. But we nevertheless will address the claim that they

make on appeal.

Use by the public may be established if it is shown that even a comparatively small number of persons used the road for six years continuously. *Town of Belle Prairie v. Kliber*, 448 N.W.2d 375, 379 (Minn. App. 1989). The record shows that Sharon Theusch agreed at trial that the public has been "driving up and down {Gateway Drive) for years and years." Based on this evidence, we conclude that the district court's findings regarding public use for the required statutory period is not clearly erroneous.

We likewise conclude that the district court's finding regarding the maintenance requirement is not clearly erroneous. "To satisfy the maintenance requirement, the maintenance must be of a quality and character appropriate to an already existing public road." *Rixmann*,

723 N.W.2d at 496 (quotation omitted). The supreme court has explained that it is not necessary that every part of a road be worked on during the six years or even that some part of the road be worked on every year during the six years to establish statutory dedication. *Ravenna*, 314 N.W.2d at 217 (citing *Leeper v. Hampton Hills, Inc.*, 290 Minn. 143, 146, 187 N.W.2d 765, 767-68 (1971). Rather, "it is sufficient if maintenance if performed when necessary." *Rixmann*, 723 N.W.2d at 496; *see also Kliber*, 448 N.W.2d at 379-80 (holding that evidence that the township graded the road annually and that the township had "bills allowed for roadwork" was sufficient to satisfy the maintenance requirement). Here, the evidence shows that the township (1) arranged to have Gateway Drive graded and snowplowed,

(2) trimed trees along the road, (3) performed annual road inspections, and (4) "put[] gravel down where appropriate," and that all of these activities occurred over a period of more than six years.

The Theusches claim that there is no evidence to show that the maintenance activities on Gateway Drive were of a type "similar to that for other public roads." But courts have generally found that activities substantially similar to those here, when performed on more than one or two occasions, are sufficient to satisfy the maintenance requirement. *Compare Leeper,* 20 Minn. At 147, 187 N.W. 2d at 768 (concluding that evidence showing that during an eight-year period, a road had been plowed and graded and that weeds had been removed was sufficient),

*And Kliber,* 448 N.W.2d at 379-80 (concluding that evidence showing that a township would "drag the road and level it off" once or twice a year was sufficient), *with Ravenna,* 314 N.W.2d at 218 (concluding that the maintenance requirement had not been satisfied when there had been only one instance of maintenance during a 24-year period and no evidence of snowplowing), *and Foster,* 515 N.W.2d at 586 (affirming a finding that the maintenance requirement had not been satisfied when the evidence showed that the city, although it regularly plowed snow off the road, had spread gravel and "laid blacktop" on the road only once.

**B. The district court's determination of the width of Gateway Drive does not exceed the width of actual use.**

The Theusches challenge the district court's determination of the width of Gateway Drive for purposes of statutory dedication, arguing that the district court "did not determine the dedication according to the land actually used." The width of a road dedicated under section 160.05 is limited to the width of actual use." Minn. Stat. 160.05, subd. 1. A dedication beyond the width of actual use is an unconstitutional taking because it does not provide the landowner with notice of the adverse use by the public, which would allow the landowner to take action to bar users from the property. *Barfnecht v. Town Bd. Of Hollywood Twp.*, 304 Minn. 505m 508, 232 N.W.2d 420, 423 (1975). But the width is "not limited to that portion of the

that portion of the road actually traveled, it may include the shoulders and ditches that are needed and have actually been used to support and maintain the traveled portion." *Id.* at 509, 232 N.W.2d at 423.

The district court found that the dedication of Gateway Drive extended to the road's "supporting slopes and structure," which consists of 25 feet to either side of the centerline, and that the "down slope area...was a supporting part of Gateway Drive." The Theusches contend that the evidence is insufficient to support the district court's finding because there was no "engineering or other competent testimony" that the slopes actually support the roadway. We disagree that expert testimony was necessary to support the

District court's finding and find no error in the district court's determination of the width of Gateway Drive.

**C. Section 160.05, subdivision 1, bars the Theusches' claims of trespass to land and an entitlement to compensation for a taking of their real property.**

In applying Minn. Stat. 160.05, subd. 1 the provisions for statutory dedication of a public road, the Minnesota Supreme court has explained:

> Section 160.05 , subd 1, provides no method by which government can *take* property. The statute, rather, provides a substitute for the common-law creation of highways by prescriptive or adverse use. During the running of the six-year statute, the township and public are adverse users and, at any time during that period, the landowner

> may seek damages for trespass, he may bar users from the property or he may force the township, if he wishes to continue to use his property, to condemn it and pay compensation. After six years have passed, however, he is estopped from asserting those rights. The township and the public acquire rights not because tbey taken them, but because the landowner forfeits them by failing to act within the prescribed period.

*Shinneman v. Arago Tp.*, 288 N.W.2d 39, 243 (Minn. 1980) (citation omitted); *see also Barfnecht*, 304 Minn. At 508, 232 N.W.2d at 423 ("The statute provides a statute of limitations, the running of which estops an owner from denying the existence of

a public easement.") An affected property owner, therefore, "has no complaint if his request for relief is held barred by long acquiescence and laches or by the running of a statute of limitations." *Shinneman*, 288 N.W.2d at 244.

Here, the record supports the district court's determination that there has been public use and maintenance of Gateway Drive by a road authority for longer than the required statutory period of six continuous years. The requirement for statutory dedication under section 160.05 has been satisfied and the required statutory period of six continuous years has passed. As a result, Gateway Drive, including its supporting slopes and structures, has been established as a public road. Accordingly, the Theusches are estopped from asserting a right to compensation for a taking, and the district court correctly concluded that their claim is barred by

Section 160.05. And because the removal of trees along Gateway Drive was limited to the property that had been established as a public road under section 160.05, the Theusches' trespass-to-land claim is likewise barred.[2]

**II. The district court erred by concluding that the Theusches were entitled to damages for**

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[2] The Theuschs also argue that the township's recording of Gateway Drive and the accompanying right-of-way in early 1991 is defective because the Theusches were not given notice of the public hearing that was held regarding the resolution to record the road and because the town-road map was recorded more than 90 days after it was passed. See Minn. Stat. 164.35, subd 4 (2006) (requiring that a township send notice of the hearing by mail to property owners who will be directly affected by the resolution if adopted and requiring that the township record the town-road map within 90 days after adopting the map). But whether the township failed to satisfy the requirements of section 164.35, subdivision 4, is irrelevant because Gateway Drive has been established as a public road by statutory dedication under section 160.05.

**Leslie Township's violation of Minn. Stat. 160.22 (2006)**

The district court concluded that although the removal of trees from the Theusches' property occurred with the township's right-of-way for Gateway Drive, they are "entitled to damages in the amount of $5,600 for diminution in value of their property as a result of {the township's} failure to provide notice," as required by Minn. Sate. 160.22. By notice of review, respondents challenge the district court's award of damages.

> Section 160.22 provides, in pertinent part: prior to ordering the cutting and removal of trees and hedges not acquired, the road authority shall fix a time and place of hearing...to consider the cutting and removal of such trees and hedges. The owners of the abutting land shall be given written notice of the hearing at least ten

days prior to the date fixed therefore. At the hearing the abuting owners shall be given the opportunity to be heard.

Trees, hedges and other shrubs or plants within the limits of any town road and not acquired by the town.....may be cut and removed.....when they interfere with the maintenance.....of the road or with the safety and convenience of the public; provided that the town gives written notice to the abutting owner of its intention to cut and remove 14 days before taking such action and the abutting owner does not request a hearing during that period. The notice shall plainly advise the abutting owner of the right to a hearing.

Minn. Stat. 160.22, subds. 5, 10 (2006). Respondents concede that the township's failure to give the Theusches notice violated section 160.22. They contend, however that there is no private cause of action for such a violation and that district court erred by awarding the Theusches damages. This is a question of statutory interpretation reviewed de novo. *Hibbing Educ. Ass'n v. Pub. Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985)

A statute does not give rise to a private cause of action unless "the language of the statue is explicit or it can be determined by clear implication." *Valakis v. Putnam*, 504 N.W. 2d 264, 266 (Minn. App. 1993). Principles of judicial restraint prevent courts from creating new statutory causes of action that do not exist at common law when the legislature has not provided for a private cause of action either by the express terms of a statute or by clear implication.

*Becker v. Mayo Found.*, 737 N.W.2d 200, 207 (Minn. 2007). The express terms of section 160.22 make no provision for a private cause of action; therefore, the question is whether one is clearly implied.

In deciding whether a private cause of action can be clearly implied from a statute, Minnesota courts consider three factors (1) whether the plaintiff belongs to the class for whose benefit the statue was enacted, (2) whether the legislature indicated an intent to create or deny a remedy, and (3) whether implying a remedy would be consistent with the underlying purpose of the legislature enactment. *Flour Exch. Bldg. Corp. v. State,* 524 N.W.2d 496, 499 (Minn. App. 1994), *review denied* (Minn. Feb. 14, 1995).

The statute at issue requires that a township give notice to the owners of property abutting the road and an opportunity to be heard before the township

Removes trees from the property. Minn. Stat. 160.22, subds. 5, 10. This notice requirement shows that the statute was enacted for the benefit of owners of abutting property. Thus, the Theusches, as owners of property that abuts Gateway Drive, clearly belong to the class for whose benefit the statute was enacted. And implying a cause of action would be consistent with the underlying purpose of section 160.22. The Minnesota Supreme Court, in applying a statute that was a predecessor to section 160.22—Minn. Gen. Stat. 2609 (1923)—commented that the statute "is in recognition of the abutting landowner's ownership to the center of the street and his right to timber growing thereon." *Powell v. Carlos Twp.*, 177 Minn. 372, 374, 225 N.W. 296, 297 (1929). But we conclude that because a separate statutory provision, Minn. Sat. 561.04 (2006), expressly provides a private cause of action for the conduct that the

Theusches complain of, the legislature did not intend to create a private cause of action for a violation of section 160.22. *See Minn. Life & Health Ins. Guar. Ass'n v. Dep't of Commerce*, 400 N.W.2d 769, 774 (Minn. App. 1987) (noting that legislative intent may also be ascertained by considering other statutes concerning the same subject matter).

Minn. Stat. 561.04 provides:

> Whoever without lawful authority cuts down or carries of any...tree...on the land of another person, or in the street or highway in front of any person's house...is liable in a civil action to the owner of such land...for treble the amount of damages which may be assessed therefore, unless upon the trial it appears that the trespass was casual or involuntary....

When the township failed to provide notice to the Theusches before it cut down the trees, it violated section 160.22. Consequently, the township was "without lawful authority" to cut down the trees. Because section 561.04 expressly provides for a private cause of action in such circumstance, there is no need to imply a private cause of action from section 160.22. We therefore reverse the district court's decision that the Theusches were entitled to damages for the violation of section 160.22.

The Theusches also argue that the district court's award of $5,600 damages (1) is the result of an error of law because it failed to include compensation for a taking of their real property and (2) is not sustained by the evidence. We have already determined that the Theusches's claim that they are entitled to compensation for a taking is barred by section 160.05. And because the district court improperly based its award of damages on the violation of

section 160.22, we remand for further proceedings to consider the Theusches' claim under section 561.04.

**Affirmed in part, reversed in part, and remanded.**

/s/ Bruce D. Willis

JUDGE BRUCE D. WILLIS

**APPENDIX B**

STATE OF MINNESOTA

COUNTY OF TODD

IN DISTRICT COURT

SEVENTH JUDICAL DISTRICT

CIVL DIVISION

C3-05-492 10/04/2006

HONORABLE CLERK OF THE COURT

WILLIAM WALKER Tammie Chapin

RICHARD AND SHARON THEUSCH,

v.

TAD BERG AND EVERETT BERG

AND LESLIE TOWNSHIP

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT, *JUDGMENT***

1. Richard and Sharon Theusch were owners of certain property located in Todd County Minnesota, legally described as follows to wit:

A tract of land lying and being in Government Lot 2 and the Southwest Quarter of the Southwest Quarter (SW1/4 SW 1/4) of Section Twenty-five (25), Township One Hundred Twenty-nine (129), North of Range Thirty-five (35) West of the 5th P.M. described as follows, to wit: To find the point of beginning commence at the northeast corner of Lot 25 of Little Deer Beach Addition as per plat there of on file and of record in the office of the County Recorder of Todd County, Minn.; Thence Easterly and on the north line of said Lot 26 if extended to the point where said line, extended, intersects the west line of the Southwest Quarter of Section 25; thence due east 140 feet more or less to the centerline of the township road running northeasterly and southwesterly thru said SW1/4 of said Section 25, which said point of beginning of the tract hereby conveyed; thence continuing due east, three hundred

and sixty (360) feet; thence due South four hundred fifty (450) feet; thence due west five hundred feet more or less to the west line of said Southwest Quarter of said Section 25; thence north along said west line of said Southwest Quarter of said Section 25, one hundred fifty-six (156) feet more or less to the center line of said township road; thence Northeasterly along the centerline of said township road to the point of beginning. Reserving unto the Grantors, their heirs and assigns, however, an easement for ingress and egress over and across the westerly 33 feet of the tract hereby conveyed.

2. That on November 14, 2003, Tad and Everett Berg, as contractors for Leslie Township, cut certain brush and stumps along a roadway formally known as Bambi Trial, now known as Gateway Drive, immediately in front of property owned by Plaintiffs.

3. That as a result of the activities of the Defendants, approximately 135 trees of various size, varieties and types, were cut and removed from the property.
4. The timber removed from the property was offered to the Plaintiffs. Plaintiffs refused the timber.
5. Bambi Trial, now know as Gateway Drive, has been in existence since the early 1970's, and the township recorded a 50 foot right of way for Bambi Trial dated 1990 and recorded in 1991.
6. The Plaintiffs were not given notice of the Hearing to record the roadway.
7. There has been public use and maintenance of Bambi Trial, now known as Gateway Drive, in excess of six consecutive years, since the early 1970's to the present time.

8. That Plaintiffs' Summons and Complaint were served on the Defendants on May 23, 2005.

9. That the cutting of the brush and trees by and at the request of the Township, and by the Bergs, was confined to the down slope area from the road which was a supporting part of Gateway Drive.

10. That the Township has acquired Gateway Drive and its supporting slope and structures, a distance equal to 25 feet on either side of the center line of Gateway Drive, as depicted on a survey completed by Sam DeLeo, dated November 8, 2005.

## CONCLUSION OF LAW

1. That Plaintiff's claims are barred by the applicable Statute of Limitations, due to the

Township's maintenance activities including, Snowplowing, grating, and brush removal.

2. Plaintiffs are not entitled to a recovery for damages because their claims are barred by Satute of Limitations pursuant to Minnesota Statute 160.05.

Now therefore, the Court makes the following as its Order for Judgment:

1. The Plaintiffs are entitled to no recovery of damages.
2. That the Defendants are awarded their costs and disbursements.
3. That the Plaintiffs' claims are dismissed with prejudice.

**LET THE JUDGMENT BE ENTERED ACCORDINGLY.**

/s/_____

HONORABLE WILLIAM WALKER
JUDGE OF DISTRICT COURT

**JUDGMENT**

As required in the Order of Judgment above, the Conclusions of Law as set forth above are hereby adopted as the Judgment on file herein.

/s/_____

Tami Chapin

Court Administrator

## APPENDIX C

STATE OF MINNESOTA
COUNTY OF TODD
IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
CIVIL DIVISION

C3-05-492 02/27/2007

HONORABLE CLERK OF COURT

WILLIAM WALKER Tammie Chapin

RICHARD AND SHARON THEUSCH,

v.

TAD BERG AND EVERETT BERG
AND LESLIE TOWNSHIP

**AMENDED AND RESTATED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT, *JUDGMENT***

**FINDINGS OF FACT**

1. Richard and Sharon Theusch were owners

of certain property located in Todd County Minnesota, legally described as follows to wit:

A tract of land lying and being in Government Lot 2 and the Southwest Quarter of the Southwest Quarter (SW/4 SW1/4) of Section twenty-five (25), Township One Hundred Twenty-nine (129), North of Range Thirty-five (35) West of the 5th P.M. described as follows: to wit: To find the point of beginning commence at the northeast corner of Lot 25 of Little Deer Beach Addition as per plat there of on file and of record in the office of the County Recorder of Todd County, Minn.; Thence Easterly and on the north line of said Lot 26 if extended to the point where said line, extended, intersects the west line of the Southwest Quarter of Section 25; thence due east 140 feet more or less to the centerline of the township road running northeasterly and

Southwesterly thru said SW1/4 of said Section 25, which said point of beginning of the tract hereby conveyed; thence continuing due east, three hundred and sixty (360) feet; thence due South four hundred feet more or less to the west line of said Southwest Quarter of said Section 25; thence north along said west line of said Southwest Quarter of said Section 25, one hundred fifty-six (156) feet more or less to the center line of said township road; thence Northeasterly along the centerline of said township road to the point of beginning. Reserving unto the Grantors, their heirs and assigns, however, an easement for ingress and egress over and across the westerly 33 feet of the tract hereby conveyed.

2. That on November 14, 2003, Tad and Everett Berg , as contractors for Leslie Township, cut certain brush and stumps along a roadway formally known as Bambi Trail, now know as

Gateway Drive, immediately in front of property owned by the Plaintiffs.

3. That as a result of the activities of the Defendants, approximately 135 trees of various size, varieties and types, were cut and removed from the property.
4. The timber removed from the property was offered to the Plaintiffs. Plaintiffs refused the timber.
5. Bambi Trail, now know as Gateway Drive, has been in existence since the early 1970's, and the township recorded a 50 foot right of way for Bambi Trail dated 1990 and recorded in 1991.
6. The Plaintiffs were not given notice of the Hearing to record the roadway.
7. There has been public use and maintenance of Bambi Trail, now known as Gateway Drive, in

excess of six consecutive years, since the early 1970's to present time.

8. That Plaintiffs' Summons and Complaint were served on the Defendants on May 23, 2005.
9. That the cutting of the brush and trees by and at the request of the Township, and by the Bergs, was confined to the down slope area from the road which was a supporting part of Gateway Drive.
10. That the Township has acquired Gateway Drive and its supporting slope and structures, a distance equal to 25 feet on either side of the center line of Gateway Drive, as depicted on a survey completed by Sam Deleo, dated November 8, 2005.
11. Plaintiffs were not give notice of Defendant Leslie Township's intention to cut trees and brush pursuant to Minn. Stat. 160.22.

## CONCLUSIONS OF LAW

1. Even though the cutting of trees and brush occurred within the Township right of way of Gateway Drive, Plaintiffs are entitled to damages in the amount of $5,600.00 for diminution in value of their property as a result of Defendants Leslie Township's failure to provide notice pursuant to Minn. Stat. 160.22.
2. That Plaintiff's remaining claims are barred by the applicable Statute of Limitations, due to the Township's maintenance activities including, snowplowing, grading, and brush removal.

Now therefore, the Court makes the following as its Order for Judgment:

1. The plaintiffs are entitled to damages in the amount of $5,600.00

2. That Plaintiffs' remaining claims are dismissed with prejudice.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

/s/ _____

HONORABLE WILLIAM WALKER
JUDGE OF DISTRICT COURT

**JUDGMENT**

As required in the Order of Judgment above, the Conclusions of Law as set forth above are hereby adopted as the Judgment on file herein.

/s/ _____

Tami Chapin
Court Administrator

## APPENDIX D

STATE OF MINNESOTA

IN SUPREME COURT

A07-848

RICHARD AND SHARON THEUSCH.

Petitioners,

v.

TAD BERG, et. al.,

Respondents

## ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Richard and Sharon Theusch for further review be, and the same is, DENIED.

DATED: July 15, 2008

BY THE COURT:

/s/_____

ERIC J. MAGNUSON

CHIEF JUSTICE

## APPENDIX E

STATE OF MINNESOTA
COUNTY OF TODD
IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
CIVIL DIVISION

| | |
|---|---|
| C3-05-492 | 12/18/2006 |
| HONORABLE | CLERK OF COURT |
| WAYNE R. FARNBERG | Tammie Chapin |

RICHARD AND SHARON THEUSCH

v.

TAD BERG AND EVERETT BERG
AND LESLIE TOWNSHIP

---

### ORDER

The above mentioned proceedings was heard on the 26th day of July, 2006, at 1:30 p.m., before the

Honorable Wayne R. Farnberg, Judge of District Court at the Todd County Government Center, Long Prairie, Minnesota. The Petitioner was present and represented by G. Marlene Clark of Marlene Clark, P.A., 25 Third Street South, Long Prairie, MN 56347 and the Respondent was not present but was represented by Gordon H. Hansmeier, Rajkowski Hansmeier Ltd., Attorneys at Law, 11 – 7th Ave. N., P.O. Box 1433, St. Cloud, MN 56302-1433.

Having reviewed all the files and records presented before this Court,

Now therefore, IT IS ORDERED:

1. The Defendant's Motion in Limine regarding notice and penalty issues is hereby **denied**.

Dated this 18th day of December, 2006.

/s/_____

HONORABLE WAYNE R. FARNBERG

JUDGE OF DISTRICT COURT

## APPENDIX F

STATE OF MINNESOTA
COUNTY OF TODD
IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

---

In re: Vacation of a Portion of Little Deer Beach Addition Plat of Leslie Township

**FINDINGS OF FACT, CONCLUSION OF LAW, ORDER FOR JUDGMENT AND JUDGEMENT AND DECREE**

THE ABOVE ENTITLED MATTER came on for hearing before the undersigned, the Honorable Donald A. Gray, Judge of said Court, at the Courthouse in the City of Long Prairie, County of

Todd, State of Minnesota, on the 25th day of September, 1984.

Petitioner appeared in person and by this attorney, Neil E. Johnson of Larson, Johnson & Peters, P.A., Long Prairie, Minnesota.

After hearing all the evidence adduced at trial by Peitioner, and being fully advised in the premises, and upon all files, records and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. That Petitioner, MORRIS A BREKKE, is an owner of land included in the LITTLE DEER BEACH ADDITION PLAT of LESLIE TOWNSHIP.
2. That all the taxes assessed against such land described in the Petition for Vacation have been paid.
3. That the Notice required by Minnesota Statute 505.14 has been properly given.

4. That the portion of the platted road subject to the Petition for Vacation has been been developed for use as a road. It has not been used as a road, is not presently being used as such, and is presently being used in a manner which is inconsistent with the use as a road, and an alternative access has been provided for the owners and occupants of land that would be affected by the proposed vacation; and, therefore; the road, subject to this Petition, is useless for the purpose for which the Plat was laid out.
5. That all owners and occupants of land that would be affected by the proposed vacation would not be damaged thereby, and that all such parties have access by roads, easements or other methods of ingress and egress, not

subject to this Petition. That Petitioner has given an easement to the road owners of Lot 18 of the above mentioned plat, across platted and unplatted land of the Petitioner. The purpose of the Easement is to provide ingress and egress from the established Township Road to Lot 28. By the granting of such Easement, all owners and occupants of land that would be affected by the proposed vacation, would not be damaged thereby, and that all such parties have access by raod easement, or other methods of ingress and egress not subject to this Petition. Said easement granted by Petitioner is attached as Exhibit "A". Attached is Exhibit "B" which is the Consent to the Vacation by adjoining property over, Blain Ostrander. The Easement granted by Petitioner shall terminate in the event of common ownership of Lot 28 and any of the following described land

Which would provide direct access from the existing Township Road to Lot 28 without the granting of an easement.

The land described as follows:

To find the point of beginning start 230.97 feet North of the Southwest corner of Goverment Lot 2 of Section 25, Township 129, Range 35, to point of beginning; thence North 201.31 feet along the East line of Lot 28 of Little Deer Beach Addition to Leslie Township, thence Easterly to township road; thence Southerly along said township road to a point due East of point of beginning, thence to point of beginning (provided that any such common ownership must provide access from the township road to Lot 28).

Said easement shall be recorded with the County Recorder and a copy of this Order and Easement provided to the owners of Lot 28.

From the foregoing, the Court makes the following:

CONCLUSIONS OF LAW

That the Petitioner is entitled to the Judgment and Decreee of this Court as follows:

1. That the following portions of the Little Deer Beach Addition Plat of Leslie Township shall be vacated, and that title to the portion of the road specified below shall be in the persons entitled thereto:

   That portion of the Little Deer Beach Addition Plat road situated North of an imaginary line extending easterly across said road from the South line of lot Twenty-four (24) and South from the South line of Lot Twenty-eight (28).

ORDER FOR JUDGMENT

Let Judgment be entered accordingly.

Dated: This 9th day of October, 1984.

/s/_____

HONORABLE DONALD A. GRAY
JUDGE OF DISTRICT COURT

JUDGMENT AND DECREE

I certify that the above Conclusions of Law constitute the Judgment and Decree of this Court.

Dated: This 9th day of October, 1984

/s/_____

Margaret A. Minke
Clerk of Court